IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 177 of 2007
With
CRIMINAL MISC.APPLICATION No. 178 of 2007
With
CRIMINAL MISC.APPLICATION No. 179 of 2007
With
CRIMINAL MISC.APPLICATION No. 181 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHENDRAKUMAR TULSIBHAI PATEL - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR VM PANCHOLI for Applicant(s) : 1,
MR MR MENGDE, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 26/09/2007

COMMON ORAL JUDGMENT

1. As common question of law and facts arise in this group of applications, they are being disposed of by this common judgment and order.

2. Criminal Misc. Application No. 177 of 2007 is filed by the applicant – original accused No.2 to quash and set aside the complaint being criminal case No. 2210 of 2005 pending before the learned JMFC, 4th Court, Vadodara qua the applicant.

   Criminal Misc. Application No. 178 of 2007 is filed by the applicant – original accused No.2 to quash and set aside the complaint being criminal case No. 2211 of 2005 pending before the learned JMFC, 4th Court, Vadodara qua the applicant.

   Criminal Misc. Application No. 179 of 2007 is filed by the applicant – original accused No.2 to quash and set aside the complaint being criminal case No. 2212 of 2005 pending before the learned JMFC, 4th Court, Vadodara qua the

applicant.

Criminal Misc. Application No. 181 of 2007 is filed by the applicant – original accused No.2 to quash and set aside the complaint being criminal case No. 2213 of 2005 pending before the learned JMFC, 4th Court, Vadodara qua the applicant.

3. Aforesaid four complaints – criminal cases are filed by the respondent No.2 – original complainant against the respective applicants before the learned JMFC, 4th Court, Vadodara for the offence under section 138 of the Negotiable Instrument Act; 1881 (hereinafter referred to as "the NI Act" for short) alleging inter alia that the original accused No.1 is the proprietor of one Proprietorship Firm - S.J.Patel Firm and is doing business of selling and purchasing tobacco and that he is the sole responsible person for issuing the cheque with his signature towards the goods supplied to it and accused No.2 is the nominated person of the original accused No.1

and that he is also responsible for the cheque issued by the original accused No.1, who has purchased the goods for and on behalf of the original accused No.1. It is further alleged in the said complaints that the accused No.2 on behalf of the accused No.1 has purchased the goods by different eight invoices and the accused No.2 has given various cheques signed by the original accused No.1 and the said cheques were deposited with their banker and all the cheques were returned by the bank with an endorsement **"insufficient fund."** It is further averred in the complaints that both the accused persons were served with the statutory demand notices as requires under section 138 of the NI Act and the applicant has given evasive reply and as the cheque amounts were not paid within 15 days from the date of receipt of the statutory notices, the original complainant has preferred aforesaid criminal cases against the applicant and others for the offence under section 138 of the NI Act. In all the aforesaid four complaints, the learned JMFC has issued

summons upon the applicant and other for the offence under section 138 of the NI Act and therefore, the applicant – original accused No.2 has preferred present applicants to quash and set aside the aforesaid criminal complaints.

4. Shri V.M.Pancholi, learned advocate appearing for the respective applicants – original accused No.2 has vehemently submitted that as the cheques in question were neither signed by the applicants nor drawn by the applicants, and admittedly even as per the averments in the complaints, goods have been purchased by the original accused No.1 and he has issued the cheques in question, the applicants cannot be held liable for the prosecution under section 138 of the NI Act. It is also further submitted that admittedly the original accused No.1 who has issued the cheques and in whose favour of the goods have been sold is a Proprietorship Firm and therefore, the applicants cannot be even held vicariously liable under section 141 of the NI Act. Shri Pancholi, learned advocate

has relied upon the decision of the Hon'ble Supreme Court in case of ***Raghu Lakshminarayanan V/s. M/s. Fine Tubes*** reported in **AIR 2007 SC 1634**. He has also further submitted that even the criminal complaint is already filed against the applicant and others being M Case No.6 of 2006 for the offences under sections 406, 420, 463, 464, 467, 468, 471, 107, 192, 193, 416, 422 r.w. section 120 (b) of the Indian Penal Code with regard to the very transaction and the cheques in question. It is also further submitted by him that the complaints were filed on 28.2.2005 and the verification by the complainant was made on 20.10.2005 i.e. after a period of 8 months and in the meantime, two other complaints were also filed against the applicant and other under section 138 of the NI Act being criminal case Nos.322 of 2005 and 323 of 2005 before the learned JMFC, Vadodara and in the said complaints, learned JMFC, 4th Court, Vadodara by its order dated 3.2.2005 issued summons against the accused No.1 only and did not issue any summons against the applicant –

original accused No.2 and the said order has become final inasmuch as the complainant has not challenged the same and the complainant was aware of the same and therefore, there was no verification in the present complaints till 20.10.2005 and probably the learned Magistrate is changed, thereafter there was a verification after the period of 8 months and the learned JMFC, 4th Court, Vadodara has issued summons against the applicant – original accused No.2 for the offence under section 138 of the NI Act. Under the circumstances, it is submitted that the impugned complaints have been filed against the applicant – original accused No.2 with a malafide intention and to pressurize the applicant. It is submitted that considering the provisions of section 138 of the NI Act, more particularly, when the applicant is neither the signatory of the cheques nor has drawn the cheques from his account, to continue criminal proceedings against the applicants would be abuse of process of Court and therefore, it is requested to exercise the powers under section

482 of the Criminal Procedure Code as no case is made out against the applicant and/or it cannot be said that the applicant has committed any offence as alleged under section 138 of the NI Act and therefore, it is requested to dismiss the aforesaid criminal complaints so far as the applicant – original accused No.2 is concerned.

5. On the other hand, all these applications are opposed by Shri Hriday Buch, learned advocate appearing for the original complainant. It is submitted by him that according to the complainant, accused Nos. 1 and 2 are one and the same and even the original accused No.1 – S.J.Patel has submitted one application / pursis before the learned JMFC submitting that he has nothing to do with any transaction and/or any Proprietorship Firm – S.J.Patel and he is not doing any business of tobacco and even on inquiry from the bank of Baroda, Vijapur branch it is found that the bank account from which the cheques were drawn are in the name of one Sanjay Jayantilal Suthar and even the said current

account is not in the name of S.J.Patel. Under the circumstances, it is submitted that the cheques were given by the applicant herein – original accused No.2 and thereby the applicant – original accused No.2 has committed fraud and therefore, it is requested not to exercise the powers under section 482 of the Criminal Procedure Code. He has also relied upon two writings of the applicant (pages – 78 and 79) by which the applicant is alleged to have admitted that he is sorry for the cheques in question and that he will see to it that the payment is made towards the cheque amount vide communication / letters / writings dated 6.2.2004 and 28.2.2004. He has also further submitted that even with regard to the complaints filed by the original complainant against the applicant and other for the offence under sections 406, 420 and other offences of the Indian Penal Code, the applicant has obtained bail from this Court by submitting that original complainant has already filed the complaint under section 138 of the NI Act therefore also, it is requested not to exercise

the powers under section 482 of the Criminal Procedure Code. It is submitted that even the goods have been purchased by the applicant No.1 and for that purpose he has relied upon the invoices in which it is stated S.J.Patel C/o. M/s. Mahendra Tulsibhai Patel. Shri Buch, learned advocate appearing for the original complainant has relied upon the decision of this Court in case of ***Dipendra G. Choksi & Another V/s. Dipak Chimanlal Patel*** reported in **1997 (2) GLR 1191** as well as another decision of this Court in case of ***Punjab Tyre House & Others V/s. State of Gujarat & Another*** reported in **2003 (1) GLR 18** (head-note 'C' para 13.5) and has submitted that as observed by this Court, it is the duty of the Magistrate to screen and examine the allegations and if prima facie the offence of cheating is made out then to issue the process for an offence punishable under section 420 of the Indian Penal Code also in complaint filed under section 138 of the NI Act. Therefore, it is submitted that looking to the conduct of the applicant – original accused No.2

and the averments and allegations in the complaint, when the applicant has committed fraud and cheating even the learned Magistrate ought to have issued summons upon the applicant for the offence under section 420 of the Indian Penal Code also. In the alternative, it is further submitted by him that in the facts and circumstances of the case, criminal complaint filed by the complainant against the applicant and others for the offence under sections 406 and 420 and other offences under the Indian Penal Code is to be heard along with the complaints under section 138 of the NI Act. He has also further submitted that unless there is any abuse of process of law or to meets the ends of justice, the powers under section 482 of the Criminal Procedure Code are to be exercised and the facts do not warrant exercise of powers under section 482 of the Criminal Procedure Code. Under the circumstances, it is requested to dismiss all the applications.

6. Shri M.R.Mengde, learned APP has requested to

pass an appropriate order considering the averments and allegations in the criminal complaints, more particularly, considering the fact that even a separate independent complaint is already filed by the original complainant against the applicant and others for the very transaction in question for the offence under sections 406, 420 and other offences under the Indian Penal Code.

7. Heard the learned advocates appearing on behalf of the respective parties.

8. At the outset, it is required to be noted that the very respondent No.2 – original complainant has filed two other complaints being criminal cases No. 322 of 2005 and 323 of 2005 in the Court of learned JMFC, Vadodara under section 138 of the NI Act with respect to the very transaction in question by making similar allegations and averments which are made in the impugned criminal complaints and the said complaints are filed on 3.2.2005 and in the said

complaints, the learned JMFC, 4th Court, Vadodara has issued the summons only against the accused No.1 for the offence under section 138 of the NI Act and no summons have been issued against the applicant – original accused No.2 and the said orders have become final inasmuch as they are not challenged by the respondent No.2 herein – original complainant. It is also required to be noted that the impugned complaints are filed on 28.2.2005 and the verification by the original complainant in the complaints in question are made in the month of October – 2005 i.e. after the period of 8 months and there is no explanation whatsoever for such a delay in verification. Now, as stated above, similar allegations are made which are made in those complaints, in the present impugned complaints also and still the learned Magistrate, 4th Court, Vadodara has issued summons in the present complaints against the applicant – original accused No.2.

9. Now, in the complaints in question, it is a

specific case on behalf of the original complainant that the original accused No.1 – S.J.Patel is the proprietor of one Proprietorship Firm – S.J.Patel and he is carrying on the business of selling and purchasing the tobacco at the address mentioned in the cause title and he is the responsible person of signing the cheques and issued the cheques towards goods supplied and purchased by the accused No.1. In para – 3, it is submitted that the accused No.2 is the nominated person of accused No.1 and is responsible person to make the payment towards the cheques for the goods purchased by accused No.1. In the complaint, it is further submitted that the accused No.2 has purchased the goods in question on behalf of the accused No.1 and has given the cheques in question signed by the accused No.1 for and on behalf of the accused No.1. Now, considering the aforesaid averments and allegations in the complaint, section 138 of the N.I.Act is required to be considered. Section 138 of the N.I.Act reads as under :-

"Section 138 Dishonour of cheque for insufficiency, etc., of funds in the account -

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punishable with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of he said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

10. As per section 138 of the NI Act, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge in whole or in part of any debt or other liability, is returned by the bank unpaid either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank “**such person shall be deemed to have committed**

an offence and shall without prejudice to any other provisions of the said Act, be punished." Under the circumstances, **"such person, who has drawn the cheque on an account maintained by him is required to be prosecuted for the offence under section 138 of the NI Act."** In the present case, admittedly, the applicant – original accused No.2 is neither the signatory of the cheque nor has drawn the cheque on an account maintained by him with the banker. In the present case, admittedly the cheques in question are drawn and signed by the accused No.1 and might be the accused No.2 – applicant herein might have given the said cheques and it can be said that the applicant – original accused No.2 might have committed any other offence under the Indian Penal Code but so far as criminal liability for the offence under section 138 of the NI Act is concerned, in the facts and circumstances of the case and as stated above, when the applicant – original accused No.2 is neither the signatory of the cheques in question nor has drawn the cheques in question on an

account maintained by him, it cannot be said that he is liable for the prosecution under section 138 of the NI Act and/or he has committed offence under section 138 of the NI Act. Under the circumstances, to continue criminal proceedings by way of impugned criminal complaints against the applicant – original accused No.2 for the offence under section 138 of the NI Act requires to be quashed and set aside as to continue with the said criminal proceedings would be abuse of process of Court.

11. Now, so far as reliance placed upon the decisions of this Court in case of ***Dipendra G. Choksi & Another*** (supra) and in case of ***Punjab Tyre House & Others*** (supra) are concerned and the submissions made by the learned advocate appearing for the respondent No.2 – original complainant that even the learned Magistrate on making out a case for cheating even in a complaint under section 138 of the NI Act can issue process for the offence under section 420 of the Indian Penal Code also is concerned, it

is required to be noted that so far as present cases are concerned, respondent No.2 – original complainant has already filed private complaint against the applicants and others for the offence under sections 406, 420 and other offences under the Indian Penal Code and therefore, said aspect has become academic so far as present cases are concerned. Even otherwise, it is required to be noted that in the present criminal complaints, the learned Magistrate has not issued summons upon the applicant and others for the offence under section 420 of the Indian Penal Code and the respondent No.2 – original complainant has never challenged the same and therefore, in the petition filed by the applicant – original accused No.2 said aspect is not required to be considered. Even otherwise, in the case of ***Dipendra G. Choksi & Another*** (supra), it was the case in which the learned Magistrate issued the summons upon the accused persons for the offence under section 420 of the Indian Penal Code also along with offence under section 138 of the NI

Act and the said order was challenged before this Court and the aforesaid observations are made by the learned Single Judge. Now, so far as submissions on behalf of the respondent No.2 – original complainant that in the facts and circumstances of the case, considering the fact that the applicant – original accused No.2 has committed fraud and therefore, this Court should not exercise the powers under section 482 of the Criminal Procedure Code and the further contention that powers under section 482 of the Criminal Procedure Code should not be exercised unless it is found that there is abuse of process of law or to meet the ends of justice is concerned, as held by the Hon'ble Supreme Court in case of ***State of Haryana & Others V/s. Bhajan Lal & Others*** reported in **1992 Supp (1) SCC 335**, more particularly, in para 102, where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused or where the uncontroverted

allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused or where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party, the powers under section 482 of the Criminal Procedure Code can be exercised and the complaint / FIR can be quashed. Now, considering the facts of the case on hand and as stated above, more particularly, when the applicant – original accused No.2 is neither the signatory nor has drawn the cheques in question on an account maintained by him with a banker, it cannot be said that the applicant – original accused No.2 has committed any offence as alleged under section 138 of the NI Act and/or the ingredients of making out a case

under section 138 of the NI Act against the applicant are satisfied. Admittedly, original accused No.1, who has drawn the cheques in question and/or issued the cheques in question is a Proprietorship Firm and as held by the Hon'ble Supreme Court in case of ***Raghu Lakshminarayanan*** (supra), a proprietor stands absolutely on a different footing. As held by the Hon'ble Supreme Court in the said decision, a proprietor concerned stands absolutely on a different footing and a person making a business in the name of a business concerned if he is the proprietor thereof would be solely responsible for conduct of its affairs and proprietor concerned is not a company. Therefore, it is held that if the offence has not been committed by the company, a question of their being a director or is being vicariously liable therefore, would not arise. Now, considering the aforesaid facts and circumstances of the case and when ingredients of section 138 of the NI Act are not fulfilled so far as the applicant – original accused No.2 is concerned, the impugned

complaints against the applicant – original accused No.2 requires to be quashed and set aside, more particularly, in other two criminal cases, in which similar allegations and averments are made, the summons are issued only against the original accused No.1 only and the said order has become final.

12. Now, so far as the alternative submission on behalf of the respondent No.2 – original complainant that the complaint filed by the respondent No.2 – original complainant against the applicant and others for the offence under sections 406, 420 and other offences under the Indian Penal Code and the impugned complaints under section 138 of the NI Act are to be heard and tried together is concerned, it will be open for the respondent No.2 – original complainant to make suitable applications before the concerned learned Magistrate and as and when such an applications are made, the same shall be dealt with in accordance with law and on merits.

13. For the reasons stated above, all the applications succeed. Criminal case Nos. 2210 of 2005, 2211 of 2005, 2212 of 2005 and 2213 of 2005 pending in the Court of learned JMFC, 4th Court, Vadodara in so far as applicant – original accused No.2 is concerned are hereby quashed and set aside. Rule is made absolute to the aforesaid extent in each of the applications.

[M.R.Shah, J.]

kdc